

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

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In the Matter of

International Settlements Policy Reform  
International Settlement Rates

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IB Docket No. 02-324

IB Docket No. 96-261

**COMMENTS OF CABLE & WIRELESS USA, INC.**

Erik Whitlock  
CABLE & WIRELESS USA, INC.  
Director of Economic Analysis  
1130 Connecticut Avenue, NW  
Suite 1201  
Washington, DC 20036  
(202) 912-2469  
(202) 530-8094

Michelle Mesen  
CABLE & WIRELESS USA, INC.  
Sr. Manager, International Government Relations  
1130 Connecticut Avenue, NW  
Suite 1201  
Washington, DC 20036  
(202) 912-2468  
(202) 530-8094

Dated: January 14, 2003

## **SUMMARY**

Cable & Wireless USA, Inc. (C&W”) believes that the Federal Communications Commission’s (“FCC” or “Commission”) international telecommunications policies, including its settlements and benchmark policies, have played an important role in reducing foreign termination costs in recent years. U.S. consumers have benefited significantly from those reductions in the form of lower collection rates for many services on many routes. C&W submits that the Commission should continue the process it first began in the *International Settlement Policy (“ISP”) Reform Order*, 14 FCC Rcd 7963 (1999), by implementing additional deregulation through a relaxation of its ISP. In particular, C&W recommends removal of the ISP on all benchmark-compliant routes. The maintenance of an overly prescriptive ISP could be counterproductive to the effort to lower foreign termination rates and U.S. collection rates below current levels.

This change requires only a modest alteration of the Commission’s current ISP policies – namely, removal of the requirement that termination rates must be 25% below the benchmark for removal of the ISP. Further, eliminating the ISP on all benchmark-compliant routes is consistent with the current status quo in the marketplace. Because it is now lawful for facilities-based U.S. carriers to enter into ISR arrangements on any ISR (“International Simple Resale”)-eligible route covering as much as 100% of switched international traffic, the ISP has ceased to play any meaningful regulatory role on those routes even under the current regime. Further, C&W asks that the Commission eliminate an apparent anomaly in its policy framework by holding that ISR will be permitted on all benchmark-compliant routes, even for non-World Trade Organization (“WTO”) member countries.

U.S. international regulation would thus be simplified through the introduction of a single trigger for removal of the ISP and qualification for ISR approval. Further, we believe that by establishing benchmark compliance as this trigger, the Commission will induce further settlement rate reductions to the benefit of U.S. consumers.

Along with the support for broader ISP deregulation, C&W acknowledges that safeguards against abuse of foreign market power continue to be necessary and appropriate. Specifically, the Commission should retain the right to use its enforcement powers to address demonstrated anti-competitive behavior on a case-by-case basis and, if necessary, to re-impose the ISP on specific routes. The Commission also should continue to require confidential filings of agreements for foreign carriers with market power, and it should maintain its current “no-special-concessions” rule. C&W submits that these safeguards are more than adequate to protect competitive conditions in the U.S. international marketplace.

With respect to foreign mobile termination rates, C&W believes that in “calling party pays” regimes, each mobile network operator has market power in traffic termination on its own network. Although the variable costs of termination may be modestly higher than on fixed networks, mobile operators in many foreign jurisdictions have used this slightly higher cost as a pretext for demanding exorbitant rates, including some rates that exceed the applicable settlement rate benchmark on the route. Surcharges for mobile termination over and above what is paid for traffic terminated on the fixed network are now commonplace. U.S. consumers are directly harmed by being forced to pay higher costs to call foreign mobile networks, and this harm is compounded by the fact that many subscribers are unaware of these surcharges before they make such calls.

C&W recommends that the FCC undertake two actions to address this issue. First, the Commission should monitor and enforce the current requirement in 47 C.F.R. § 42.10(b) that U.S. international carriers publish a full listing of international rates on their websites, including any mobile surcharges. The Commission should also monitor these rates to ensure that as foreign mobile rates begin to decline, these cost reductions are passed on to U.S. consumers promptly.. Second, many national regulators and international agencies, such as the European Commission, are taking direct action to regulate mobile call termination. C&W encourages the Commission to continue to advise foreign regulators on the United States' experience in setting mobile interconnection rates as foreign governments study this issue in their own jurisdictions. Although the Commission may wish to consider more prescriptive actions in the future if this problem persists, C&W believes that the Commission should first give foreign governments the opportunity to correct the problem.

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**COMMENTS OF CABLE & WIRELESS USA, INC.**

Cable & Wireless USA, Inc. (“C&W”) hereby comments on the *Notice of Proposed Rulemaking (“NPRM”)* released by the Commission on October 11, 2002 in the above-captioned proceeding. The *NPRM* examines possible reform of the Commission’s International Settlements Policy (“ISP”), as well as the Commission’s policies governing international simple resale (“ISR”) and settlement rate benchmarks.

For over 120 years, Cable & Wireless has provided telecommunications services, information services, networks, and equipment to business and residential customers around the world. In its capacity as a retail and wholesale international voice carrier, C&W has been keenly aware of the convergent impact of competitive entry, technological innovation, and national regulations on the evolution of the international voice markets. Most notable has been the steady decline of foreign termination rates over the last few years and the resulting benefits passed on to U.S. consumers through lower collection rates on many routes. C&W urges the Commission to use this proceeding as an opportunity to take further steps to promote competitive entry in the U.S. market in order to ensure that collection rates continue to track the declining costs of terminating U.S.-billed international calls.

## **I. REFORMING THE INTERNATIONAL SETTLEMENTS POLICY**

### **A. U.S. CONSUMERS ARE BENEFITING FROM REDUCTIONS IN FOREIGN TERMINATION RATES**

The *NPRM* (at ¶¶ 1 & n.3, 12, 18) cites statistics showing that U.S. international retail rates have fallen significantly over the last several years. While this trend has not been uniform among all routes or types of service offerings, C&W agrees with the Commission that many U.S. consumers have enjoyed significant savings through lower collection rates. C&W's own collection rates in the United States have closely followed this trend: declines of 80% or more are typical.

We believe that this decline in U.S. collection rates is directly related to the reduction in foreign termination costs, including settlements, over the last several years. C&W believes that at least four different factors have played a material role in forcing foreign termination rates lower. First, the liberalization policies of foreign governments, including those undertaken as part of compliance with the *WTO Basic Telecommunications Agreement*, and accompanying *Reference Paper*, have helped to accelerate competitive entry in numerous countries, thereby creating new termination options and imposing downward, market-based pressure on foreign termination rates. Second, the development of a spot market for terminating voice traffic around the globe has taken advantage of refile, third-country routing, and other alternative routing mechanisms to generate market pressure for lower foreign termination rates. Third, the Commission's adoption of mandatory benchmark settlement rates for all countries in *International Settlement Rates*, 12 FCC Rcd 19806 (1997), has led to a precipitous drop in the international settlement rates paid by U.S. international carriers. Fourth, the Commission's *ISP Reform Order*, 14 FCC Rcd 7963 (1999), increased the number of routes on which ISR is permissible, thereby generating further pressure on above-cost international settlement rates

through multi-tier, asymmetrical termination rate agreements. C&W believes that these factors will continue to push foreign termination costs, and U.S. collection rates, lower on many international routes in the years ahead.

**B. COMPETITION IS INCREASING IN DEVELOPING MARKETS: MORE BENEFITS TO COME**

The *NPRM* (at ¶ 19) cites evidence that competition has increased significantly across the globe. C&W's own experience confirms these statistics, and C&W expects this trend to intensify as more developing countries negotiate WTO telecommunications offers or otherwise advance their liberalization agendas. In virtually all developing markets in which C&W has active affiliates, there are concrete examples of the increasing global trend towards competition. For example, in Anguilla, Barbados, the British Virgin Islands, Cayman Islands, and Turks and Caicos Islands, discussions are progressing on near-term full market liberalization. In Dominica, Grenada, St. Kitts and Nevis, St. Lucia, and St. Vincent, the governments eliminated remaining exclusive rights in all services in 2002. In Panama, all services were fully liberalized as of January 1, 2003. In Jamaica, all services are slated to be fully liberalized by March of this year.

Furthermore, the market share of incumbents in many of these markets is likely to fall faster than similar declines experienced by incumbents in developed markets. The growing attractiveness of mobile communications as a substitute for fixed services and the relatively narrow customer base in developing countries mean lower barriers to entry and higher potential for market penetration by new entrants. As new entrants gain market share quickly, they will sign operating agreements with new U.S. facilities-based carriers and put downward pressure on international termination rates in these countries. As competitive conditions in the U.S. market

grow stronger, these termination cost declines ultimately should benefit U.S. consumers through even lower U.S. international collection rates.

C. **THERE ARE ADVERSE INCENTIVES INHERENT IN THE INTERNATIONAL SETTLEMENTS POLICY**

In the *ISP Reform Order*, 14 FCC Rcd at 7972-73, the FCC expressed serious concerns about maintaining an overly broad ISP, which could prevent new entry into the U.S. international telecommunications market and stop carriers from responding flexibly and quickly to changing market conditions. Rigidly applied, the ISP eliminates the ability of U.S. carriers to negotiate comparatively favorable arrangements with foreign carriers, and the proportionate return policy creates a cost disadvantage for new entrants by bundling the U.S.-inbound and U.S.-outbound traffic streams, thereby hindering competitive entry on the U.S. end. As the Commission correctly summarized, “applying our international settlements policy where unnecessary actually inhibits competition in the U.S. market and may be depriving U.S. consumers of benefits of greater competition.” *ISP Reform Order*, 14 FCC Rcd at 7964. The Commission also has discussed the ISP’s free-rider effects, as smaller carriers can benefit from the same deal that larger carriers negotiate but without having to expend the same resources. *See NPRM* at ¶ 21 & n.67. This effect creates a disincentive for smaller carriers on a route to negotiate aggressive or innovative arrangements with foreign carriers.

The FCC responded to these concerns in the *ISP Reform Order* by taking several important steps towards relaxing the ISP. Among other reforms, the FCC removed the ISP where the foreign carrier lacks market power or where the settlement rate for at least 50% of the settled traffic is more than 25% below the benchmark rate. *ISP Reform Order*, 14 FCC Rcd at 7981-88. C&W believes that these reforms have played an important role in reducing foreign

termination costs and generating lower collection rates for the benefit of U.S. consumers. Given the success of the *ISP Reform Order*, C&W urges the Commission to consider implementing further ISP deregulation in this proceeding to promote competitive entry in the United States, thereby fostering additional foreign termination cost reductions and creating the necessary conditions for additional collection rate relief for U.S. consumers.

**D. THE ISP SHOULD BE REMOVED ON BENCHMARK COMPLIANT ROUTES**

C&W believes that the Commission can go beyond removing the ISP on routes where the foreign carrier lacks market power or where the prevailing settlement rate is more than 25% below the benchmark. In particular, C&W does not see any significant value in retaining the ISP on routes where the incumbent foreign carrier has accepted the benchmark settlement rate and, accordingly, where the foreign country qualifies to be placed on the Commission's list of ISR-approved countries.

The change proposed here by C&W requires only a modest adjustment of the FCC's current policy – eliminating the requirement that the settlement rate be 25% below the benchmark rate. Based on C&W's experience, the 25% requirement is not necessary to protect the U.S. market against “whipsawing” or other anti-competitive activities by foreign incumbent carriers. In C&W's view, market evolution and new technological applications in the last few years have demonstrated to most foreign carriers that these types of activities cannot be successfully implemented in the United States today. The reality is that even benchmark settlement rates are subject to persistent bypass activities through refile, third-country routing, and other alternative termination mechanisms. Hence, a key prerequisite to successful whipsawing or other anti-competitive activities – namely, a strangle-hold over bottleneck foreign termination services – simply does not exist in the vast majority of countries today.

Moreover, given current market forces, C&W believes that most foreign carriers in middle-income and low-income countries have already been negotiating below-benchmark termination rates through ISR arrangements or other termination alternatives. Once countries reduce settlement rates to the benchmark level, and hence qualify to be placed on the ISR-approved list, it is not uncommon to see the incumbent foreign carrier negotiate an ISR arrangement that further reduces the average rate for termination traffic on the foreign fixed network by more than 10%. We have seen cases of up to 50% reductions in this average rate. In this environment, there is no significant benefit to retaining the ISP, which only risks undermining the expansion of U.S. competitive opportunities. C&W submits that the Commission should maximize downward pressure on foreign termination rates by removing the ISP in its entirety on benchmark-compliant routes.

Of course, there may be a few markets where effective competition will not occur in the near future and current market forces may not succeed in pushing termination rates much below the current benchmark. However, rather than keep the ISP in place for these few markets, C&W believes that the FCC's other safeguards and enforcement mechanisms, as discussed below, should prove adequate to control any market abuses. Further, the total amount of traffic represented by these few countries is a minuscule portion of the overall market for U.S.-billed international traffic. It would be impractical for the Commission to retain the ISP simply to deal with these countries.

**E. THE FCC SHOULD CLARIFY ITS ISR POLICY**

As a practical matter, removing the ISP on all benchmark-compliant routes may not represent any significant departure from the status quo. The ISP, as an effective matter, has

ceased to exist on routes where the foreign country accepts the benchmark rate and is placed on the Commission's ISR-approved list.

The ISR concept has changed dramatically since it was first introduced over a decade ago. In fact, the term itself – international simple resale – has become something of a misnomer since, as the Commission itself recognizes, there is no longer any resale requirement. Even a facilities-based U.S. international carrier may engage in ISR. *See ISP Reform Order*, 14 FCC Rcd at 7968. Equally important, the notion that ISR applies to switched international minutes being routed over international private lines no longer has any real meaning. As the Commission notes, correspondent carriers are permitted to designate any capacity as an “international private line” for ISR purposes.<sup>1</sup> The result is that once a route is placed on the ISR-approved list, it is possible for U.S. international carriers to negotiate ISR agreements with their foreign correspondents covering 100% of the switched international minutes being exchanged on the route. This is, in fact, what occurred on a number of routes after they became ISR-eligible.

The reality is that ISR arrangements have marginalized the ISP to the point of obscurity on ISR-permissible routes.<sup>2</sup> Under the Commission's long-standing policy, ISR arrangements are not subject to the ISP. *See ISP Reform Order*, 14 FCC Rcd at 7968. Instead,

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<sup>1</sup> C&W is not aware of any Commission decisions or policies which restrict the ability of U.S. and foreign carriers to designate capacity as “international private lines” for ISR purposes.

<sup>2</sup> It is noteworthy that the FCC publishes on its website a list of the countries for which the ISP has been removed. Currently there are only 15 countries on that list, although C&W believes that many additional countries qualify under the 50%/25% benchmark threshold. In C&W's view, private parties have not sought to add new countries to the list because there is no need to do so; the ISP can be effectively removed on any route simply by routing traffic pursuant to lawful ISR agreements.

U.S. carriers may negotiate separate arrangements involving multi-tiered asymmetrical termination rates without any proportionate allocation of return traffic. On a route where U.S. and foreign carriers have decided to route 100% of international switched minutes pursuant to ISR agreements, there is no traffic that is governed by the ISP. Hence, while the Commission is technically correct when it states in the *NPRM* (at ¶ 8 n.30) that the ISP still remains in force on routes approved for ISR, as a practical matter the ISP has been superseded by ISR arrangements and plays no meaningful role in disciplining the activities of U.S. or foreign carriers on these routes.

As a result, removing the 25% requirement for ISP deregulation on benchmark-compliant routes, as C&W proposes in these comments, would be entirely consistent with current market conditions. C&W is not aware of any significant problems that have occurred under the Commission's current ISR regime since the *ISP Reform Order* was adopted, which is strong evidence that removing the 25% policy will not harm competitive conditions in the U.S. international market, but instead will improve them by reducing regulatory confusion and confirming that U.S. carriers are free to negotiate aggressive and innovative arrangements on ISR-approved routes.

The table below shows that under the Commission's current policy framework, there are four possible "arrangements" between a U.S. international carrier and its foreign correspondent for the exchange of international switched traffic (*see Table 1*). First, there is the "traditional bilateral" approach under which the ISP applies and the route is not eligible for ISR. Second, there is the "hybrid bilateral" relationship in which the ISP still applies, but a WTO country or non-WTO country offering analogous rights can be eligible for ISR status. Third, on some non-WTO routes, which are listed in Table 1 as "potentially competitive" routes, the ISP is

removed because the 50%/25% benchmark threshold is satisfied, but ISR arrangements are not permitted because the foreign country has not shown that it offers equivalent entry rights to U.S. carriers. Fourth, if the route meets the “50%/25%” benchmark threshold and there is no WTO-based disqualification for ISR eligibility, then the ISP is removed and ISR is authorized.

**Table 1. Current ISP/ISR Regulatory Regimes**

| <b>Arrangements<br/>Between Carriers</b> | <b>Status of Regulatory<br/>Constraint</b> | <b>Conditions on Foreign End</b>  |
|--|--|---|
| Traditional Bilateral                    | ISP, No ISR                                | More than 50% of traffic is not benchmark compliant   |
| Hybrid Bilateral                         | ISP, ISR                                   | At least 50% of traffic is benchmark compliant and a) WTO; or b) non-WTO, but equivalent right offered  |
| Partially competitive                    | No ISP, No ISR                             | At least 50% of traffic is 25% under benchmarks but non-WTO w/out equivalent right offered              |
| Potentially fully competitive            | No ISP, ISR                                | At least 50% of traffic is 25% under benchmarks and a) WTO; or b) non-WTO, but equivalent right offered |

As C&W demonstrated above, there would appear to be no compelling reason to maintain in place the “hybrid bilateral” category. Given the current broad definition of ISR, there is no need for the ISP to govern whatever traffic continues to be subject to settlements on these routes (potentially no traffic at all) rather than ISR arrangements. As a practical matter, there is no reason to retain this “hybrid bilateral” relationship, and its existence serves only to add regulatory uncertainty. In C&W’s view, it would be best to simplify the regulations by confirming that the ISP applies to all traffic or to no traffic on these routes.

**F. THE DISTINCTION BETWEEN WTO AND NON-WTO FOR ISR APPROVAL IS BECOMING IRRELEVANT**

The Commission's current policies reflect an apparent anomaly in the treatment of non-WTO member countries for ISP and ISR purposes. As noted in Table 1 above, it is possible for the ISP to be removed on a non-WTO route because the foreign carrier has accepted a settlement rate that is at least 25% below the benchmark rate, but ISR is technically not authorized on the route because the foreign carrier has not shown that it offers equivalent resale opportunities to U.S. carriers. The removal of the ISP on these routes would appear to contemplate the very types of non-standard arrangements that today fall under the broad umbrella of ISR arrangements. As a result, there is uncertainty on any such routes as to whether a particular arrangement is permissible given the removal of the ISP, or impermissible given the absence of ISR authorization. C&W recommends that the Commission resolve this tension between the ISP and ISR policies by adopting a policy that the ISP will be removed, and ISR will be authorized, on all benchmark-compliant routes.

In consideration of the overwhelming number of countries who are current WTO members or who are expected to accede to the WTO in the near future, we believe that resolving this inconsistency between the ISP and ISR regimes in favor of deregulation is justified. The list of non-WTO member countries is growing smaller, and the vast majority of those countries, many of whom are small islands, are low-volume routes that have no more than a *de minimis* share of U.S.-billed international minutes. There is Commission precedent for declining to apply U.S. international policies to routes characterized by a *de minimis* amount of traffic.<sup>3</sup>

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<sup>3</sup> E.g., *In the Matter of the Merger of MCI Communications Corp. and British Telecommunications plc*, 12 FCC Rcd 15,351, ¶¶ 290-91 (1997) (forbearing from regulating MCI as a dominant carrier on the U.S.-Gibraltar route despite MCI's affiliation

Further, if the incumbent carrier in any of these non-WTO countries were to engage in objectionable activities, the Commission would retain its traditional enforcement powers. U.S. international carriers will continue to be governed by basic Title II obligations, such as the prohibition against unjust and unreasonable practices in Section 201(b), 47 U.S.C. § 201(b), and the prohibition against unjust and unreasonable discrimination in Section 202(a), 47 U.S.C. § 202(a). Further, current filing requirements ensure that the Commission will continue to see copies of all contracts with the foreign incumbent carriers in these countries that affect traffic routing and exchange. *See* 47 C.F.R. § 43.51. As a result, removing the ISP and authorizing ISR on these non-WTO country routes will not put at risk the U.S. public interest in competitive telecommunications markets.

**G. ISP CONDITIONS SHOULD BE ELIMINATED ON ISR-APPROVED ROUTES**

In sum, C&W recommends that the FCC take steps in this proceeding to continue the process, first begun in the *ISP Reform Order*, to remove regulatory impediments to market-based competition in the U.S. international telecommunications sector. In particular, C&W submits that the Commission should remove the ISP, and authorize ISR, on all benchmark-compliant routes for WTO and non-WTO member countries alike. The regime embodied in our proposals is summarized below (*see Table 2*). This regime establishes a workable path to complete ISP deregulation. By tying benchmark implementation to ISP deregulation, the Commission will create a mechanism that promotes the goal of ensuring that U.S. collection

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with the incumbent foreign carrier given the *de minimis* U.S.-billed minutes on the route); *In the Matter of Motion of AT&T Corp. to be Declared Non-Dominant for International Service*, 11 FCC Rcd 17,963, ¶¶ 94-97 (1996) (forbearing from applying dominant carrier regulation to AT&T on four routes where AT&T was the sole facilities-based U.S. carrier given the *de minimis* U.S.-billed minutes on those routes).

rates are reduced as much as possible, as quickly as possible, and on as many routes as possible, to the benefit of U.S. consumers.

**Table 2. Proposed ISP/ISR Regulatory Regimes**

| <b>Arrangements<br/>Between Carriers</b> | <b>Status of Regulatory<br/>Constraint</b> | <b>Conditions on Foreign End</b> |
|--|--|----------------------------------|
| Traditional Bilateral                    | ISP, No ISR                                | Route is not benchmark compliant |
| Flexible                                 | No ISP, ISR                                | Route is benchmark compliant     |

## **II. SAFEGUARDS MUST BE MAINTAINED**

C&W acknowledges that some safeguards against abuse of market power by incumbent foreign telecommunications carriers may continue to be necessary. In particular:

*The Current Benchmarks Should be Maintained.* C&W is fully aware that market power will continue to persist in many jurisdictions that are or will be benchmark compliant. The market for mobile termination is a particularly relevant example of this (and is addressed below). As a result, the FCC should maintain its current benchmark rate levels as ceilings.

*The FCC Should Re-Impose the ISP for Benchmark Compliant Countries in the Case of Abuse of Market Power.* There is the possibility that some markets in the future will become less competitive even after the incumbent carrier has accepted benchmark settlement rates, or that a foreign carrier with market power would engage in some form of anti-competitive conduct. As discussed above, the Commission should reserve the right to utilize its enforcement powers to take action on a case-by-case basis when it has evidence of any such activities. Although C&W hopes that this remedy will not be necessary, the Commission has the ability to re-impose the ISP, while de-listing a country from ISR approval, in order to prevent conduct harmful to the U.S. public interest.

*The FCC Should Continue to Require Confidential Filings of Agreements with Foreign Carriers with Market Power.* In order to maintain its ability to monitor market-place behavior in order to curb anti-competitive activity and ensure compliance with other aspects of its international traffic exchange policies, the Commission must continue to require filings of agreement to some degree. C&W believes that the current rule, which limits this obligation to contracts with incumbent foreign carriers, is working well and should be retained.

*The FCC Should Maintain the Existing “No-Special-Concessions” Rule.* The FCC currently maintains a rule that effectively forbids all U.S. international carriers from bargaining for, or accepting, exclusive or discriminatory preferences with respect to the provisioning of circuits and the quality of service. C&W believes that this rule will go a long way toward preventing the types of objectionable conduct which could undermine U.S. competitive market conditions.

### **III. MOBILE TERMINATION RATES**

#### **A. MOBILE TERMINATION RATES ARE EXCESSIVE IN MANY JURISDICTIONS**

In the *NPRM* (at ¶¶ 45-51), the Commission seeks comment on the high mobile interconnection rates that certain foreign carriers are imposing on U.S.-outbound calls to countries with “calling party pays” regulatory regimes. The significance of “calling party pays” is that in countries where such a system exists, mobile operators have market power over call termination. Although retail mobile markets in many foreign countries are regarded as competitive because two or more facilities-based operators compete for the business of customers, this does not mean that the call termination markets are fully competitive. The call recipient has few or no incentives to limit termination rates, while the carrier initiating the call must pay the terminating carrier’s rates if it desires to complete the call. The market for the

termination of calls is that of the single operator on which the call is terminated.<sup>4</sup> Therefore, effective competition in the call termination market does not exist, and mobile operators have both the incentive and ability to charge above-cost termination rates.

The Commission has made similar findings that non-incumbent local exchange carriers (“LECs”) in the United States, while not being classified as dominant carriers, nevertheless possess some market power over terminating interstate access charges. In particular, the Commission has held that the “terminating access markets consist of a series of bottleneck monopolies over access to each individual end user.”<sup>5</sup> In order to limit excessive pricing of termination services, the Commission adopted access charge benchmarks to limit the ability of terminating LECs to use FCC-filed tariffs to impose excessive rates on other carriers. The fact that foreign mobile operators can charge rates demonstrably far in excess of costs without any significant loss of business is evidence that they possess the same type of market power as terminating LECs in the United States. As the number of mobile users has continued to grow, the market has not been able to remedy this failure.

This general market power in call termination has translated into excessive international settlement rates for termination on foreign mobile networks. Thus, while settlement rates for termination on fixed networks have declined over time, separate rates for termination on

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<sup>4</sup> This conclusion on market definition is also supported in a case currently before the European Commission (“EC”), which concerns the potential abuse by KPN of its dominant position with respect to the termination of mobile calls on its network. The EC is not expected to reach its final decision on this case until 2003 but has set out its conclusions on market definition in its March 2002 press release. This can be viewed at: [http://europa.eu.int/rapid/start/cgi/guesten.ksh?p\\_action.gettxt=gt&doc=IP/02/483|0|RAP ID&lg=EN](http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/02/483|0|RAP ID&lg=EN)

<sup>5</sup> See *AT&T Corp. v. Business Telecom, Inc.*, 16 FCC Rcd 12,312, ¶21 (2001) (citing *Access Charge Reform*, 16 FCC Rcd 9923, ¶¶ 30-32 (2001)).

mobile networks – some of which exceed the Commission’s benchmark rate – have emerged. The impact is felt by U.S. consumers, as U.S. operators are forced to increase the cost of calls to foreign mobile numbers through surcharges to cover the costs collected by foreign mobile operators operating in the “calling party pays” systems. In C&W’s experience, these surcharges can raise the price of an international call to a mobile number by more than two times higher than the price to a fixed network number.

**B. THERE ARE REGULATORY PROCEEDINGS IN SOME JURISDICTIONS TO DECREASE THE COST OF MOBILE TERMINATION**

There have been a number of public consultations in important jurisdictions on the comparative costs and pricing of fixed versus mobile network termination, and the consensus conclusion has been that mobile termination rates are excessive. In the United Kingdom, for example, a year-long inquiry by the Monopolies and Mergers Commission<sup>6</sup> (now renamed the “Competition Commission”) resulted in it agreeing with the U.K. regulator (“Of tel”) that price controls on mobile termination rates were necessary. These were imposed in 1999 on Vodafone and mmO2 (previously called BTCellnet). Of tel reviewed the issue in 2001,<sup>7</sup> and concluded that there were separate markets for call termination on each of the mobile operator’s networks; that each mobile operator was dominant with respect to termination of calls on its own network and was charging excessive termination rates. It further concluded that the appropriate remedy was to continue with price controls and to extend these to all four mobile operators--Vodafone,

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<sup>6</sup> *Cellnet and Vodafone: Reports on references under section 13 of the Telecommunications Act 1984 on the charges made by Cellnet and Vodafone for terminating calls from fixed-line networks*, Monopolies and Mergers Commission, January 1999. Available at: <http://www.competition-commission.org.uk/reports/421cellnet.htm#full>

<sup>7</sup> *Review of the Charge Control on Calls to Mobiles*, Of tel, 26 September 2001. Available at: <http://www.of tel.gov.uk/publications/mobile/ctm0901.htm>

mmO2, Orange and T-Mobile (previously named One2One). Following the mobile operators' refusal to accept Oftel's findings, the matter was again referred to the Competition Commission. It initiated its investigation in January 2002 and is due to publish its conclusions in January 2003, although its *Remedies Statement*,<sup>8</sup> issued in July 2002, suggests that it will agree with Oftel's recommendations. Similarly, in July 2001, the Australian Competition and Consumer Commission ("ACCC") concluded that mobile termination rates in Australia were excessive.<sup>9</sup>

These consultations treat the problem of excessive mobile termination within the broader regulatory context of domestic interconnection. We do not know of a foreign regulator that has reviewed and passed judgment on the appropriateness of the existing level of rates for terminating international inbound traffic on mobile networks. However, C&W knows of no reason to believe that termination of international traffic on a mobile network should be more costly than for domestic calls on the same network.

The actions in the United Kingdom and Australia can be expected to set a precedent in other jurisdictions, particularly in Europe and the Asia-Pacific region. Furthermore, C&W expects that as the proportion of international traffic destined for foreign mobile users increases, foreign mobile operators will come under increasing pressure to reduce rates. In the context of domestic interconnection, the fixed network operators will find net payments to

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<sup>8</sup> *Mobile Phones Inquiry: Remedies Statement*, Competition Commission, July 23, 2002. Available at: <http://www.competition-commission.org.uk/pressreleases/30-02REM.pdf>

<sup>9</sup> C&W would like to emphasize, however, that it does not support the remedy imposed by the ACCC, which was to link changes in the termination access prices to changes in the prices of mobile retail services (for example, calls from mobile). C&W believes that linking changes in prices in this way has perverse incentives in that it will make it less likely that network operators will compete strongly on retail prices, as they will recognize that this will result in lower termination prices too. The result is likely to be reduced competition in all the markets linked in this way.

mobiles increasing, raising their financial incentive to impose commercial, regulatory and political pressure for lower rates. In the international context, the increasing proportion of calls that are terminated on foreign mobile networks may begin to generate benchmark compliance issues. As volume-weighted average international settlement cost (including the mobile termination rate) begins to bump up against the benchmark ceiling, further pressure will be placed on the foreign mobile operator to lower its rates and on the foreign regulator to ensure that this occurs in a timely fashion. The foreign fixed network operators are likely to become the best advocates for solving the problem of mobile termination.

**C. THE FCC SHOULD NOT TAKE PRESCRIPTIVE ACTIONS AT THIS TIME**

We believe it is too soon for the FCC to take any prescriptive actions and that any such actions are likely to be ineffectual at this time in reaching the root cause of the problem of high mobile termination rates. First, as noted above, many foreign regulators in jurisdictions with the “calling party pays” system have become aware of this problem and are taking action. We have already cited examples from the United Kingdom and Australia in this submission. Regulators in Jamaica and Panama have also taken action to control mobile termination charges. In fact, C&W expects that nearly every jurisdiction within which a C&W affiliate operates will have a regulatory consultation on mobile termination within the next few years, most within two years.

Actions to lower domestic mobile termination rates, in turn, are likely to bring down the rates for terminating international traffic. Often foreign mobile operators do not distinguish between domestic and international traffic in their termination rates. As a result, any decline in domestic termination rates will directly and immediately redound to the benefit of carriers sending inbound international traffic to the foreign mobile network. Even where mobile

operators seek to maintain a higher termination rate for international calls than domestic calls, they would increasingly face bypass activities as U.S. international carriers would begin routing their calls through domestic carriers in the foreign country. Just as bypass has helped force down the settlement rates by taking traffic off the higher priced traditional bilateral channels, so would traffic inbound to mobiles find its way off international circuits to lower priced domestic links.

This situation is decidedly different from the international settlements rate regime. In that context, there was frequently no domestic equivalent to the settlement rates that foreign telecommunications carriers imposed on U.S. carriers to terminate inbound international calls. As a result, the Commission could not rely upon foreign domestic commercial, regulatory and political forces to ensure reasonable settlement rates, and was forced to take action through its benchmark policies.

Second, C&W believes that settlement rates for mobiles will be lowered by direct action as well. As market forces continue to put pressure on high termination rates, even at benchmark levels, foreign telecommunications carriers will face losses if they are not able to obtain commensurate reductions in mobile termination rates. These carriers can be relied upon to take all commercial, regulatory and political actions necessary to ensure reasonable mobile termination rates, and they may well prove successful in getting local regulators to act.

Finally, C&W is not convinced that direct action by the Commission would necessarily be effective in reducing foreign mobile termination rates. In C&W's experience, mobile operators often do not correspond directly with originating U.S. international carriers. Rather, calls are sent to the foreign telecommunications carrier, which in turn transmits the calls to the mobile operator (often an unrelated company, or operated as a separate profit center).

FCC action taken to prevent U.S. carriers from paying excessive mobile termination rates would, in the first instance, often put the foreign correspondent carrier in a squeeze. These fixed operators would need to lower mobile interconnection rates either through negotiation, regulatory intervention, threats of non-delivery of traffic, or a combination of these methods.

Furthermore, the incentives of the international operators might be different in the case of a new Commission order directed against excessive foreign mobile termination rates. In contrast to the situation with the original benchmarks order, in which international operators faced losing their entire revenue stream associated with U.S. inbound traffic in the case of non-compliance, international operators would have the option of simply declining to carry any traffic destined for the foreign mobile network. As a result, direct action by the Commission could result in disruption of service delivery for calls to foreign mobiles. This might be less beneficial to U.S. consumers than the process of allowing local market forces and regulatory action to lower the cost of mobile termination rates.

**D. ACTIVITIES THE FCC CAN ENGAGE IN TO ADDRESS THE ISSUE OF HIGH MOBILE TERMINATION RATES**

Although C&W does not believe the FCC should take prescriptive actions at this time, C&W recommends that the Commission undertake actions designed to (a) ensure that U.S. consumers know about surcharges due to foreign mobile termination rates; and (b) encourage other regulators to address the issue of domestic fixed-to-mobile termination in their own jurisdictions.

C&W supports the Commission's current rules requiring U.S. international carriers to publish their international calling rates, including mobile surcharges, on their websites. See 47 C.F.R. § 42.10(b). Even with cost-based foreign mobile termination rates, the

cost of calling a foreign mobile network may always be somewhat higher than the cost of calling a foreign fixed network,<sup>10</sup> and U.S. consumers should be made aware of these differences. C&W urges the Commission to make sure that all U.S. international carriers comply fully with the existing website disclosure obligations, and that such information is easy to find on their respective websites. C&W also urges the Commission to monitor the pricing practices of U.S. carriers to see that surcharges for mobile termination begin to decrease across the globe as mobile termination rates do. This may be a concern on thin routes where competition may not be relied upon to force collection rates to cost promptly or in an appropriate amount.

C&W supports the Commission encouraging regulators, in countries where mobile interconnect rates are clearly excessive, to revisit how those rates are set. Currently, there are instances where carriers face unreasonable interconnection rates due to long contractual arrangements. Foreign governments should be encouraged to develop arbitration mechanisms or fora in which carriers facing these burdensome contractual obligations can raise their concerns. In addition, the FCC can work with those foreign countries that are signatories to the *WTO Reference Paper on Basic Telecommunications* to comply with their commitments with regard to interconnection.<sup>11</sup> According to Section 2.2(b) of the *Reference Paper*, interconnection is to be ensured and provided “in a timely fashion, on terms, conditions (including technical standards and specifications) and cost-oriented rates that are transparent, reasonable, having regard to economic feasibility, and sufficiently unbundled so that the supplier need not pay for network

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<sup>10</sup> Mobile networks typically have higher traffic sensitive costs, but lower non-traffic sensitive costs (*i.e.*, costs vary with volume of calls).

<sup>11</sup> *E.g., Comptel’s Section 1377 Comments to the Office of the United States Trade Representative Re: Brazil, China, Colombia, France Germany, India, Ireland, Japan, South Africa and Switzerland; WTO General Agreement on Trade in Services*, ¶¶ 4-6 (January 9, 2003).

components or facilities that it does not require for the service to be provided.” Further opportunities exist for raising the issue of high cost of interconnection with foreign governments that have not yet made WTO commitments but are engaging in liberalization discussions or through U.S. bilateral trade negotiations.

#### **IV. CONCLUSION**

For the foregoing reasons, C&W submits that the Commission should continue the process of ISP deregulation begun in the *ISP Reform Order*, and that the Commission should take measured actions, although not prescriptive actions, to help procure reductions in excessive foreign mobile termination rates.

Respectfully submitted,

**CABLE & WIRELESS USA, INC.**

By:\_\_\_\_\_

Erik Whitlock  
Director of Economic Analysis  
1130 Connecticut Avenue, NW  
Suite 1201  
Washington, DC 20036  
(202) 912-2469  
(202) 530-8094

Michelle Mesen  
Sr. Manager, International Government Relations  
1130 Connecticut Avenue, NW  
Suite 1201  
Washington, DC 20036  
(202) 912-2468  
(202) 530-8094

Dated: January 14, 2003